Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 75-927

PATRICIA HOGGE, EARLE PHILLIPS
T/A PARADISE MASSAGE PARLOR, AND BO-JAC, LTD.
Petitioners,

v.

C.E. JOHNSON, CITY MANAGER, AND PATRICK G. MINETTI,
CHIEF OF POLICE, CITY OF HAMPTON, VIRGINIA,
EACH IN THEIR OFFICIAL CAPACITY
Respondents,

SCARLETT ANNE HILLIARD AND EARLE PHILLIPS,
FRENCH MASSAGE PARLOR
Petitioners,

v.

WILLIAM E. LAWSON, CITY MANAGER, AND HOWARD B.
BLACKMON, CHIEF OF POLICE, CITY OF NEWPORT NEWS,
VIRGINIA, EACH IN THEIR INDIVIDUAL CAPACITY
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

PATRICIA HOGGE, EARLE PHILLIPS
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Petitioners,

v.

C.E. JOHNSON, CITY MANAGER, AND PATRICK G. MINETTI,
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EACH IN THEIR OFFICIAL CAPACITY
Respondents,

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Petitioners,

v.

WILLIAM E. LAWSON, CITY MANAGER, AND HOWARD B.
BLACKMON, CHIEF OF POLICE, CITY OF NEWPORT NEWS,
VIRGINIA, EACH IN THEIR INDIVIDUAL CAPACITY
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment which the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 19, 1975.

OPINION BELOW

The opinions of the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit are unreported. The former (Civil Action No. 42-72-NN and 48-72-NN, April 10, 1974) is attached hereto as Appendix A. The latter (No. 74-1656 and 74-1657, August 19, 1975) is attached hereto as Appendix B. The judgment of the Court of Appeals is attached as part of Appendix B. The Court of Appeals' denial of petitioners' petition for rehearing and suggestion for rehearing *en banc* is attached hereto as Appendix C.

JURISDICTION

The decision of the Court of Appeals was entered on August 19, 1975. The order of the Court of Appeals denying Petitioner's motion for rehearing and suggestion for rehearing *en banc* was entered on September 26, 1975. By order of December 24, 1975, the Chief Justice extended the time for filing for a writ of certiorari to and including December 31, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Chapter 21-C of the Newport News, Virginia City Code provides:

> It shall be unlawful for any establishment, owner, or operator, regardless of whether it is a public or private facility, to operate as a massage parlour, bat parlour, health club, or any similar type

> business, where any physical contact or massage with the recipient of the service provided by said establishment is provided by a person of the opposite sex.
>
> It shall be unlawful for any employee, individual owner or operator of such establishment or any other type of establishment to give or administer a massage to any member of the opposite sex.

Chapter 22.1 of the Hampton, Virginia City Code provides in part:

> It shall be unlawful to administer, for hire or reward, to any person of the opposite sex any massage, any alcohol rub or similar treatment, any fomentation, any bath, or any electric or magnetic treatment, nor shall any person cause or permit in or about his place of business or in connection with his business, any agent, employee or servant or any other person under his control or supervision to administer any such treatment to any person of the opposite sex.

Title 42, section 2000(e)(b) of the United States Code provides in part:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . .

QUESTIONS PRESENTED

1. Whether the Court below erred in holding on the basis of this Court's decision in *Hicks v. Miranda* ___ U.S.

___, 94 S. Ct. 2281 (1975), dismissal of an appeal in a prior case precluded a determination of the issues in this case where petitioners had not been afforded an opportunity to ascertain what issues were properly presented in the prior appeal to this Court and where significant doctrinal developments have occurred since that appeal?

2. Whether when this Court takes summary action upon an appeal within its obligatory jurisdiction where it has not previously fully addressed the issues presented the decision of the state court should be given the same *stare decisis* effect as the opinions of this Court?

3. Whether the Court below erred in its holding that Petitioners should not be afforded declaratory relief on their claims on the basis of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e when Petitioners had established standing and where they employed fifteen (15) or more employees as required by the Act but these employees were located in adjoining towns instead of the same place of business?

4. Whether this Court's denial of Respondent's petition for a writ of certiorari from the decision of the Court below that substantial federal questions were presented in this case is *res judicata* as to that issue where no change in the relationship of the parties or their circumstances has occurred?

STATEMENT OF THE CASE

Petitioners are massage parlor owners and masseuses who challenged the constitutionality of two local ordinances prohibiting massaging of persons by members of the opposite sex. Petitioners contended that these ordinances violate the Equal Protection Clause of the Fourteenth Amendment fo the United States Constitution and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. They alleged jurisdiction in the District Court under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), 42 U.S.C. § 2000e and under 28 U.S.C. 2201.

In 1972, when first presented with these claims, the United States District Court for the Eastern District of Virginia (the Honorable Richard B. Kellam, presiding) abstained from exercising its jurisdiction on the grounds that *Younger v. Harris*, 401 U.S. 37 (1971), applied even in cases where no state prosecutions under the challenged criminal statute were pending at the time that the case challenging the statute in question was initiated in federal district court, and that the decision of the Virginia Supreme Court in *Kisley v. Falls Church*, 212 Va. 693, 182 S.E.2d 168 (1972), was binding upon the district court and thereby precluded relief in this case. Petitioners appealed that decision to the United States Court of Appeals for the Fourth Circuit, which reversed the district court's rulings and remanded for further proceedings. *Joseph v. Blair, Hogge v. Hampton, Emerson v. Newport News*, 472 F.2d 575 (1973). Respondents' petition for rehearing and suggestion for rehearing *en banc* were denied. 488 F.2d 403 (1973).

Respondents then petitioned this Court for a Writ of Certiorari, relying upon the contentions that this Court's subsequent dismissal of the appeal from the decision in *Kisley v. Falls Church*, for want of a substantial federal

question, 409 U.S. 907 (1972), determined all federal issues raised by petitioners and that the Court of Appeals had improperly interpreted the scope of the *Younger v. Harris* doctrine. (Petition for Writ of Certiorari in *Blair v. Joseph*, United States Supreme Court, No. 73-978.) That petition was denied. *Blair v. Joseph*, 416 U.S. 955 (1974).

After the hearing upon remand, the district court upheld the constitutionality of the ordinances and concluded that it did not have jurisdiction under Title VII of the 1964 Civil Rights Act, *supra*. Petitioners appealed these rulings and the appeal was argued on January 8, 1975. On August 19, 1975, relying entirely on *Hicks v. Miranda*, 422 U.S. 322 (1975), which this Court decided on June 24, 1975, the Fourth Circuit held that it was precluded from deciding the equal protection issues raised by petitioners because this Court's dismissal of the appeal in *Kisley v. Falls Church, supra*, was "a perfectly clear precedent that is binding upon us." (Appendix B, at 29a). The Court of Appeals also held that the district court's determination that jurisdiction did not lie under the 1964 Civil Rights Act was "not clearly erroneous." (Appendix B, at 29a). Petitioners' petition for rehearing and suggestion for rehearing *en banc* were denied by the Court of Appeals on September 26, 1975. On December 24, 1975, the Chief Justice granted petitioners' motion to extend the time in which to file this petition for a writ of certiorari to December 31, 1975.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THE HOLDING OF THE UNTIED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT RESOLVED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

I. THE COURT BELOW IMPROPERLY INTERPRETED AND APPLIED *HICKS V. MIRANDA, SUPRA*, – A CASE DECIDED ON JUNE 24, 1975, AND THEREFORE NEITHER BRIEFED NOR ARGUED BY THE PARTIES – WHEN, WITHOUT CONDUCTING THE COMPLETE INQUIRY REQUIRED BY *HICKS* AND WITHOUT PROVIDING THE PARTIES AN OPPORTUNITY TO BE HEARD ON THE SUBJECT, IT HELD THAT THE SUPREME COURT'S DISMISSAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION OF THE APPEAL IN ANOTHER CASE, WHICH INVOLVED A DIFFERENT STATUTE AND IN WHICH THE ISSUES IN THIS CASE WERE NOT PROPERLY PRESENTED TO THE SUPREME COURT, FORECLOSED THE RELIEF SOUGHT BY APPELLANTS IN THIS CASE.

In *Hicks v. Miranda, supra*, this Court held that its dismissal of an appeal from the decision of the highest court of a state for want of a substantial federal question is a binding determination on the merits of issues that were properly presented in the appeal to this Court. *Hicks v. Miranda, supra*, 422 U.S. 322, at 345. Appellants respectfully submit that the Court of Appeals misinterpreted and misapplied *Hicks* in this case when it held that this Court's dismissal, for want of a substantial fed-

eral question, of the appeal in *Kisley v. City of Falls Church*, 409 U.S. 907 (1972) precluded determination of the substantial federal questions which the Court of Appeals acknowledged to exist in this case. (See Appendix B, at a, Mr. Justice Clark, concurring.)

Hicks requires that once a court observes that it may be precluded from passing on issues before it because of a Supreme Court dismissal of an appeal in another case, that court must conduct an inquiry into the issues properly presented to the Supreme Court in the appeal in that case. As this Court pointed out in *Hicks:*

> Thus, had the . . . Court considered itself bound by summary dismissals of appeals by this Court, its initial task would have been to ascertain what issues had been *properly presented* in [the appeal] and declared by this Court to be without substance. *Ascertaining the reach and content of summary actions may itself present issues of real substance,* and in circumstances where the constitutionality of a state statute is at stake, that undertaking itself may be one for a three-judge court.

Hicks v. Miranda, supra, 422 U.S. 322, at 345, n. 14 (emphasis supplied).

Appellants respectfully submit that the Court of Appeals inquiry into the question of the identity *vel non* of the issues in this case and in *Kisley, supra,* was insufficiently detailed and resulted, therefore, in a mistaken conclusion by the Court. The Court of Appeals states in its opinion that

> We think the issue presented to the Supreme Court in the appeal of *Kisley* and declared by

> it to be without substance included the question sought to be raised here: whether the ordinances violate the Fourteenth Amendment's Equal Protection Clause.

(Appendix B, 29a). This statement reflects the cursory nature of the inquiry by the Court of Appeals which was conducted without benefit of briefing or argument by the parties, which is clearly in conflict with the requirements of *Hicks.*

An adequate consideration of the issues properly presented and considered in the appeal in *Kisley* to the Supreme Court requires that the parties be given an opportunity to examine the record in *Kisley* and in the present case and to submit briefs and arguments as to the scope of the issues raised in each case. This opportunity was not afforded to the parties herein, *Hicks* having been decided some six months after this case was argued. Indeed, the unexpected holding in *Hicks, cf.* (Appendix B, at 30a) (Mr. Justice Clark, concurring), and the unique, inquiry required by *Hicks* are all considerations which make briefing and argument by the parties particularly appropriate and helpful to the Court in this case.

Had such an opportunity been afforded, appellants would have demonstrated that the issues and arguments raised in the Virginia Supreme Court in *Kisley* were in fact quite limited and that a number of the issues raised in this case were not raised in the Virginia Supreme Court in *Kisley,* and not, therefore, properly presented to this Court in the *Kisley* appeal. In determining whether a substantial federal question exists, this Court will not consider issues which were not properly raised in the state court proceedings. *Whitney v. California,* 274 U.S. 357 (1926); *Dewey v. Des*

Moines, 173 U.S. 193 (1899); *Wilson v. Cook*, 327 U.S. 474 (1945); *Adler v. Board of Ed. of the City of New York*, 342 U.S. 485 (1951); *State Farm Mutual Ins. Co. v. Duel*, 324 U.S. 154 (1944); *Safeway Stores v. Oklahoma Grocers*, 360 U.S. 334 (1959); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Thus issues raised *de novo* in the jurisdictional statement can be accorded no precedential value for the purpose of the hearing conducted pursuant to *Hicks*.

An examination of the cursory brief filed before the Virginia Supreme Court in *Kisley* shows the plaintiffs in that case relied upon three grounds: (1) that the ordinances discriminated amongst classes of businesses since it did not apply to barber shops and beauty parlors; (2) that it deprived plaintiffs of property without due process of laws; and (3) that it was in conflict with relevant Virginia statutes.[1]

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[1] Counsel for Petitioners has examined the briefs submitted to the Virginia Supreme Court in *Kisley v. Falls Church, supra*, and bases the summary in the accompanying text on that examination. The briefs filed in the Virginia Supreme Court are not part of the record in this case because Petitioners have not yet been afforded an opportunity to make the requisite inquiry mandated by *Hicks v. Miranda, supra*, and this, of course, is precisely the gravamen of this petition.

It is also important to note that an examination of the briefs alone is insufficient to determine which issues were properly before the Virginia Supreme Court since that Court will not consider issues which are not argued as well as assigned as error and briefed. *Adams v. Allen*, 121 S.E.2d 364, 202 Va. 941 (1961), *National Maritime Union v. Norfolk*, 119 S.E.2d 307, 202 Va. 672 (1961).

The specific issues presented by petitioners in this case are are distinguishable from the grounds presented by the parties in *Kisley*. Appellants here primarily challenged the ordinances on the grounds that they created an overly broad classification[2] which resulted in *actual* discriminatory employment practices based solely upon the ex of the employee; this contention, and the analysis in support of it, were not raised in the Virginia Supreme Court in *Kisley* and were therefore not properly presented in the *Kisley* appeal to this Court. Appellants also argued, by analogy to *Loving v. Virginia*, 308 U.S. 1 (1966), *Harper v. Virginia State Board of Education*, 383 U.S. 663 (1965), and especially, *McLaughlin v. Florida*, 379 U.S. 184 (1966), that the equal protection guarantee is not met "with a

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[2] The preamble to the Hampton ordinance clearly indicates that the purpose of the ordinance was to prohibit prostitution. The preamble reads in part as follows:

> WHEREAS, the Council of the City of Hampton, Virginia is authorized . . . to exercise all powers which in the opinion of the Council are necessary or desirable to promote the general welfare of the City and the safety, health, peace, good order, comfort, convenience, and morals of its inhabitants; and
>
> WHEREAS, upon report of the Division of Police, administrative officers, and inhabitants of the City, such places called "massage parlors," and similar establishments as hereinafter defined are being used, or may be used because of their nature, as houses of prostitution, or palces where disorderly, lewd, lascivious and unlawful conduct or exhibitions occur; . . .

Testimony presented on behalf of the city of Newport News shows a similar intent. (See Appendix in *Hogge v. Johnson*, United States Court of Appeals for the Fourth Circuit, No. 74-1656, at 173.)

showing of equal application among the members of the class defined by the legislation." *McLaughlin v. State of Florida, supra,* 379 U.S. at 191. Thus, Petitioners have contended that the insidious doctrine of separate but equal is as unconstitutional as a basis for sex discrimination as it is as a basis for discrimination among races. This argument similarly was not raised in *Kisley* and, in fact, the Virginia Supreme Court decision expressly rests on just such discredited reasoning. *Kisley v. City of City of Falls Church, supra,* 187 S.E. 2d at 171.

Finally, Petitioners introduced evidence showing that the actual effect of the ordinances, *as applied*[3], was to necessitate hiring and firing practices which discriminated against women seeking jobs *solely* on the basis of their sex. A review of the *Kisley* litigation shows that the arguments in that case rested solely on the *facial validity* of the Falls Church Ordinance. Indeed, Respondents have previously conceded that *Kisley* involved only a facial challenge, and that a challenge, as in this case, to the ordinances as applied would raise issues which were *not* within the scope of issues presented in the *Kisley* appeal. (Respondents' Petition for Certiorari in *Blair v. Joseph, supra,* at p. 25 of the Petition.

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[3] Indeed, appellees have previously conceded that *Kisley* involved only a facial challenge and that a challenge, as in this case, to the ordinance as applied would raise issues which were *not* within the scope of the issues in the *Kisley* appeal. (Appellee's Petition for Certiorari in *Blair v. Joseph, supra,* at page 25 of the Petition).

II. THE COURT BELOW ERRONEOUSLY APPLIED *HICKS V. MIRANDA, SUPRA,* IN THIS CASE BECAUSE SIGNIFICANT DOCTRINAL DEVELOPMENTS HAVE OCCURRED SINCE THIS COURT'S DISMISSAL OF THE APPEAL IN *KISLEY V. FALLS CHURCH, SUPRA,* FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

This Court made clear in *Hicks v. Miranda, supra,* that where there are "significant doctrinal developments," a summary disposition by this Court in an earlier case will not preclude further consideration of the issue in question. *Hicks v. Miranda, supra,* 95 S. Ct. at 2289, quoting *Port Authority Bondholders Protective Committee v. Port of New York Authority,* 387 F.2d 259, 262, n.3 (2nd Cir. 1967). In the area of constitutional protection against sex discrimination, such doctrinal developments, not presented to or considered by the Virginia Supreme Court in *Kisley, supra,* have clearly occurred in recent years, beginning with *Reed v. Reed,* 401 U.S. 71 (1971). *Reed* held that discrimination on the basis of sex which lacked either a rational basis or a fair and substantial relationship to the objective sought to be achieved was prohibited by the Equal Protection Clause of the Fourteenth Amendment. The Virginia Supreme Court's decision in *Kisley, supra,* does not advert to *Reed* and does not utilize the requisite *Reed* analysis or standards.[4] That court also, of course, did not consider this Court's decision in *Fronterio v. Richardson,* 411 U.S. 677 (1973), which further enlarges and clarifies the scope of the constitutional protec-

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[4] *Reed* was decided on November 22, 1971, after submission of the briefs in *Kisley* to the Virginia Supreme Court. See Petition for Writ of Error, dated August 5, 1971, in *Kisley Falls Church,* 212 Va. 693, 187 S.E.2d 168 (1972).

against sex discrimination. These developments raise substantial doubt about the continued validity of the Virginia Supreme Court's decision in *Kisley, supra,* and about the present significance of this Court's dismissal of the appeal in that case.[5]

Finally, the *Kisley* decision relies primarily on *Ex Parte Maki,* 56 Cal. App. 2d 635, 133 P.2d 64 (1943), a case which has since been overruled by the California Supreme Court in *Lancaster v. Municipal Court,* 6 Cal. 2d 809, 494 P.2d 481 (1972). Although *Lancaster* was decided on state law grounds, the decision by the California Supreme Court in *Sailer Inn v. Kirby,* 95 Cal. Rptr. 329, 485 P.2d 529 (1971), a case involving sex discrimination in hiring practices for bartenders, shows that an ordinance such as the one in *Maki* would be vulnerable to constitutional attack in the California courts even in the absence of the state grounds present in *Lancaster.*[6]

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[5] A number of other courts have struck down ordinances similar to those at issue in this case. *J.S.K. Enterprises v. Lacey,* 6 Wash. App. 43, 492 P.2d 600 (1971); *Gianiolo v. Members of the City Council of Nashville,* 376 F. Supp 719 (E.D. N.D. 1974); *Corey v. Dallas,* 352 F.Supp. 977 (N.D.Tex. 1972), rev'd on other grounds, 492 F.2d 496 (5th Cir. 1974).

[6] Although the Court of Appeals based its decision solely upon this Court's action in *Kisley, supra,* the Court also cites *Smith v. Keator,* 206 S.E. 2d 203, 285 N.C. 530, *appeal dismissed,* 419 U.S. 1043 (1974) in a footnote. The *Smith* opinion stressed that the city in that case did not defend its ordinance on the basis of an administrative convenience. Testimony on behalf of the respondents in this case, however, clearly showed that administrative convenience was a primary purpose for the enactment of these ordinances. (See Appendix in *Hogge v. Johnson,* United States Court of Appeals for the Fourth Circuit, No. 74-1656, 74-1657, at 128-130, 148, 173.) *Cf. Reed v. Reed, supra.*

III. WHERE THIS COURT TAKES SUMMARY ACTION ON AN APPEAL WITHIN ITS OBLIGATORY AND WHERE THE COURT HAS NOT PREVIOUSLY FULLY ADDRESSED THE ISSUES PRESENTED THE DECISION OF THE STATE COURT SHOULD NOT BE GIVEN THE SAME *STARE DECISIS* AS THE OPINIONS OF THIS COURT.

Although summary actions by this Court in appeals within its obligatory jurisdiction are decisions on the merits, those lower court decisions which are summarily upheld should not be given the same *stare decisis* effect as the opinions of this Court. Without illumination by this Court it is difficult and sometimes impossible to determine if this Court is affirming both the analysis and the result achieved or solely the result achieved particularly, where the result is the same result that the Court would reach, but the decision might rest upon other grounds than those relied upon by the court below.

An example of this would be a case which involved a plaintiff seeking a declaratory judgment who lacked the requisite standing. If the state court entered judgment denying relief on other grounds and this Court summarily affirmed or dismissed for want of a substantial federal question it would be impossible at this point in time to determine whether the lower court's decision was affirmed because the plaintiff lacked standing or because this Court was approving the state court's decision on the merits. Similarly if the state court decision advanced several grounds for the basis of its decision it would be impossible to determine whether this Court's decision was affirming each independent basis for the decision or whether the Court had perhaps rejected all but one of the grounds and was basing its affirmance solely upon that one ground. Moreover, if summarily affirmed state court decisions are con-

sidered to have precedential value equivalent to the opinions of this Court, but only to the extent that issues are properly presented before this Court, parties will be required to travel around the country to examine records in other jurisdictions and will at times have to seek out unreported decisions to determine what the law of the land is according to a decision which both the state and national reporters have chosen not to publish.[7] These examples are illustrative of the untoward and unworkable effects that giving such broad precedential value to this type of decision would have upon our system of jurisprudence.

IV. THE COURT BELOW ERRED IN ITS HOLDING THAT PETITIONERS SHOULD NOT BE AFFORDED DECLARATORY RELIEF ON THEIR CLAIMS ON THE BASIS OF TITLE VII OF THE CIVIL RIGHT ACT OF 1964, 42 U.S.C. 2000e WHEN PETITIONERS HAD ESTABLISHED STANDING AND WHERE THEY EMPLOYED FIFTEEN (15) OR MORE EMPLOYEES AS REQUIRED BY THE ACT BUT THESE EMPLOYEES WERE LOCATED IN ADJOINING TOWNS INSTEAD OF THE SAME PLACE OF BUSINESS.

The District Court held that Petitioners did not meet the jurisdictional requirements of the Civil Rights Act of 1964 42 U.S.C. 2000e (Appendix A, 8a) and found that it was not required to reach the merits of their contention that the ordinances in question were in conflict with the Act. While the District Court did not state the basis for its determination that Petitioners did not meet the

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[7] *See, Rubenstein v. Cherry Hill* (N.J. 1974) *appeal dismissed* for want of a substantial federal question question, 417 U.S. 963 (1974).

jurisdictional requirements, the record reflects its concern that Petitioner massage parlor owners, while employing more than 15 employees at their several places of business, did not employ 15 or more employees at any one place of business. Petitioner Bo-Jac, Ltd., operated businesses in Hampton and Norfolk, Virginia, two adjoining cities, while Earle Phillips operated businesses in Hampton and Newport News, also two adjoining towns.

The Court of Appeals sustained this ruling, holding that it was "not clearly erroneous" (Appendix B, 29a). While the clearly erroneous standard would be the appropriate standard if the District Court's determination were a factual determination, a determination that the Act required an employer to employ 15 or more employees *at one location* is clearly a conclusion of law rather than a finding of fact. The Court of Appeals, therefore, applied an inappropriate standard when it used the clearly erroneous test.

Petitioners contend that where the nature of their action was a declaratory judgment and where they had established the requisite standing *Hogge v. Hampton*, 482 F.2d 403 (4th Cir. 1973) that the District Court was required to reach the merits of the issue they raised as to whether the Act and the local ordinances were in conflict, even if they did not meet the jurisdictional requirements. The purpose of the Declaratory Judgment Act, 28 U.S.C. 2201 was to provide an opportunity to determine prospective liability in situations like the one presented in this case. Senate Report No. 1005 73d. Cong., 2d. Sess., (1934).

The need for a determination of the issues is illustrated by the Equal Employment Opportunity Commission guidelines which provide that state laws in conflict with the Act

will not serve as a defense to an otherwise unlawful employment practice 29 CFR 1604.2 (a)(2)(1).[8] At the present time a number of state statutes have been struck down on the grounds that they were in conflict with the Act *Rosenfield v. Southern Pacific Company*, 444 F.2d 385 (9th Cir. 1971), *Diaz v. Pan American Airways Inc.*, 422 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971), *Caterpillar Tractor Co. v. Arabic*, 317 F. Supp. 1304 (S.D. Ill. 1970). Thus, even if none of the Petitioners had met the jurisdictional requirements[9] of the Act they were still entitled to maintain a declaratory action and the District Court erred in not making a determination on the merits.

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[8] 29 C.F.R. 1604.2(a)(2)(1) provides:

> Many states have enacted laws or promulgated administrative regulations with respect to the employment of females . . . The Commission has found that where such laws and regulations do not take into account the capabilities, preferences and abilities of individual females, and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

[9] There is also some question as to whether the arbitrary number of employees required by the Act is in conflict with the Fifth Amendments requirement of equal protection of the law.

V. THIS COURT'S PREVIOUS DENIAL IN THIS CASE OF RESPONDENTS' PETITION FOR A WRIT OF CERTIORARI FROM THE DECISION OF THE COURT BELOW THAT SUBSTANTIAL FEDERAL QUESTIONS WERE PRESENTED IN THIS CASE IS *RES JUDICATA* AS TO THAT ISSUE WHERE NO CHANGE HAS OCCURRED IN THE RELATIONSHIP OF THE PARTIES OR THEIR CIRCUMSTANCES.

While it is clear that the denial of a petition for writ of certiorari by this Court has no precedential value and that therefore such decision is not given *stare decisis* effect, Petitioners respectfully submit that the Court below failed to accord appropriate *res judicata* effect *in this case* of this Court's denial, 416 U.S. 955 (1974), of Respondents' petition for a writ of certiorari asserting that *Kisley v. City of Falls Church*, 212 Va. 693, 187 S.E.2d 168 (1972), *appeal dismissed for want of a substantial federal question*, 409 U.S. 907 (1972), indicated the lack of a substantial federal question in this case.

The correct interpretation of the *res judicata* effect of the denial of certiorari (in other than habeas corpus cases, where special ocnsiderations pertain), has been explained by Mr. Justice Jackson as follows:

> I agree that, as *stare decisis*, denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any other case. But for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of *res judicata*. . . .

Brown v. Allen, 344 U.S. 443, 543 (1953) (Mr. Justice Jackson, concurring).

Thus, the Supreme Court's previous, post-*Kisley* denial of certiorari is *res judicata* in this case as to the issues then before it. That disposition is a definitive and final determination by the Supreme Court, in accordance with the first decision of the Court below, that appellants have presented substantial federal questions.

CONCLUSION

This case presents important questions about the application of this Court's recent decision in *Hicks v. Miranda*, 422 U.S. 322 (1975), particularly as to the type of inquiry which is required by that case where this Court has summarily acted on a case within its obligatory jurisdiction presenting similar issues and as to the *stare decisis* effect which is to be given to such cases. In addition it raises important questions about the *res judicata* effect to be accorded the denial of a petition for a writ of certiorari and declaratory relief concerning the application of 42 U.S.C. 2000(e). Petitioners therefore, respectfully submit that a writ of certiorari should issue.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

PATRICIA HOGGE, EARLE PHILLIPS, T/A Paradise Massage Parlor, BO-JAC, LTD., T/A Miss Masseuse, Plaintiffs, v. C.E. JOHNSON, City Manager, and PATRICK G. MINETTE, Chief of Police, of the City of Hampton, Virginia, each in their official capacity, Defendants.	)	CIVIL ACTION NO. 42-72-NN

SCARLETT ANNE HILLIARD, EARLE PHILLIPS, T/A French Massage Parlor, Plaintiffs, v. WILLIAM E. LAWSON, City Manager, and HOWARD B. BLACKMON, Chief of Police, each in their official capacity, Defendants.	)	CIVIL ACTION NO. 48-72-NN

MEMORANDUM ORDER

This Court is again called upon to deal with the Massage Parlor Ordinances adopted by the City of Hampton, Virginia, March 22, 1972, and the City of Newport News, Virginia, March 27, 1972. Plaintiffs seek injunctions against their enforcement, declaratory judgment and other relief.

I

These cases were previously before the Court. Relief was denied and the cases were dismissed. Upon appeal, the United States Court of Appeals for the Fourth Circuit reversed and remanded them, directing this Court take jurisdiction and proceed to trial. Since the history of each case is somewhat different, it will be related separately.

A

On April 3, 1972, Patricia Hogge filed her complaint herein praying a temporary injunction be issued against the individual members of the City Council of Hampton, enjoining the enforcement of the "Massage Parlors" Ordinance, asserting it was unconstitutional because it violated the (a) Equal Protection Clause of the Fourteenth Amendment, (b) Due Process Clause, and (c) restricted the right to engage in a lawful business. She asserted she had no adequate remedy at law.

At the hearing on application for the temporary injunction it was established a prior action of Bo-Jac, Ltd., T/A Miss Masseuse had been filed in the State Court attacking the Ordinance.[1] The State Court denied a temporary injunction on March 28, 1972. Application was then made to one of the Justices of the Supreme Court of Virginia, which was denied March 29, 1972. In the face of these facts this Court declined to proceed further and stayed its hand.

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[1] While Patricia Hogge was not a named part in the State suit, it was established she was one of the principals in Bo-Jac.

On May 2, 1972, Patricia Hogge was granted leave to file amended pleadings in the nature of an amended petition for injunction, and for declaratory judgment, and to add other parties. Earle Phillips, T/A Paradise Massage Parlor, and Bo-Jac, Ltd., T/A Miss Masseuse, were added as plaintiffs. The amended complaint made about the same allegations as were contained in the original complaint, and prayed that (a) the Ordinance be declared unconstitutional and void, and (b) the Court issue a temporary and permanent injunction against its enforcement.

On April 27, 1972, an amended pleading was filed in the State Court action seeking declaratory judgment.

By order of July 25, 1972, this Court dismissed the suit for declaratory judgment and injunction on the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971); and *Boyle v. Landry*, 401 U.S. 77 (1971).

B

On April 26, 1972, Edwin Emerson, T/A Peninsula Massage Parlor and T/A Continental Massage Parlor, Earle Phillips, T/A French Massage Parlor, and Scarlett Anne Hilliard filed a complaint against the Members of the City Council of the City of Newport News, Virginia, seeking a declaratory judgment that the Newport News "Massage Parlors" Ordinance was unconstitutional and in violation of Title 7 of the 1964 Civil Rights Act. 42 U.S.C. 2000e. After a motion to dismiss was filed, plaintiffs were on May 5, 1972, granted leave to file an amended complaint. Each complaint prayed an injunction to restrain enforcement of the Ordinance and a declaration it was unconstitutional.

Following hearing, the motion to dismiss was granted on July 24, 1972, for the reasons stated in the opinion in the Hampton case.

C

An appeal was taken in each case with the result that each case was remanded for trial. 482 F.2d 575 (4th Cir. 1973), rehearing denied 488 F.2d 403.

II

Upon remand, counsel was on October 15, 1973, granted leave to file an amended complaint in the Newport News case, adding the City Manager and Chief of Police as defendants. Defendants answered November 21, 1973. On November 23rd, counsel moved to file an amended complaint in the Hampton case adding the City Manager and Chief of Police. Defendants that day appeared and answered.

In each of the cases, plaintiff dismissed the Members of the City Council, and Edwin Emerson was dismissed as a party plaintiff in the Newport News case.

Plaintiffs thereupon, on November 23rd, moved for a temporary injunction, but offered no evidence to support the application. By order of December 3, 1973, the application was denied.

At the hearing on November 23, 1973, a certified copy of the order of the Circuit Court of the City of Hampton was presented showing that the action instituted in that Court by Bo-Jac was not dismissed until August 24, 1973.

Following a denial of the temporary injunction on December 3, 1973, the Court scheduled these cases for hearing. Each side presented evidence and filed briefs in support of their contentions.

Abstractly stated, the evidence establishes –

1. Plaintiff, Scarlett Anne Hilliard, is not employed in French Massage Parlor.

2. That the Clientele of the parlors is almost 100 per cent men, and that the employees are all masseuses.

3. That the going price for a massage is $10.00 to $15.00, while the going price in the regularly licensed spas, health clubs and regularly licensed massage parlors is from $4.00 to $6.00, and that in such places men massage men and women massage the women.

4. That the Ordinance has created no problem for legitimately operated businesses.

5. That the plaintiff operated massage parlors and in their operation massaged the entire body, including the genitals.

6. Without the Ordinance, the policing of the places against prostitution is next to impossible and control of the places is difficult. Prior to the Ordinance, there were numerous difficulties with the places, and none since.

7. Under-cover police reported that the masseuses at the parlors informed them they were instructed to massage the male genitals, and this was the only part of the male body massaged. In a raid, arrests were made for fornication and operating a bawdy house. Offers to give further services were made for additional money.

Some of the plaintiffs had criminal prosecutions pending in the State Courts at the time these actions were filed. There were also other violations of the ordinance pending. The following demonstrate the arrests, etc.

Hampton

1. Patricia Hogge, arrested July 2, 1972, tried August 31, 1972, in Juvenile Court for permitting a 17 year old girl to work in the parlor. Convicted.

2. Katherine J. Gornik, arrested July 1, 1972, charge of massaging the opposite sex, tried August 24, 1972, found not innocent. Case dismissed August 30, 1973.

3. Jackie C. Easterling, arrested July 1, 1972, tried August 31, 1972, convicted of same offense as No. 1 above.

4. Jackie C. Esterling arrested June 30, 1972, for operating massage parlor, etc., tried August 31, 1972, and convicted.

5. Gloria Arango, arrested June 30, 1972, tried August 31, 1972, convicted.

Newport News

1. Edwin Wilbur Emerson, t/a Peninsula Massage Parlor. Arrested March 11, 1972, tried in Municipal Court April 20, 1972, found guilty. Appealed to Circuit Court and tried November 11, 1972, convicted of operating a bawdy house.

2. Eleven other arrests were made on March 11, 1972, at Peninsula Massage on charges of frequenting a bawdy house, tried in Municipal Court on April 20, 1972, and May 30, 1972. In appeals taken, three affirmed November 1, 1972. In addition there were four convictions of fornication and eight persons dismissed of charges.

3. At Continental Massage Parlor on March 11, 1972, there were 7 arrests for frequenting a bawdy house, 1 arrest for operating such a house, and fornication. These cases were tried in Municipal Court, some on March 23, 1972, some April 20, 1972, and February 13, 1973. All except one resulted in a conviction. One person charged with operating a bawdy house and fornication appealed, and on June 11, 1973, was dismissed.

4. Theodore Edward Phillips, operator of French Massage Parlor, was arrested June 30, 1972, tried in Municipal Court July 20, 1972, and found guilty of violating the Massage Parlor Ordinance. Upon his appeal, he was convicted of the offense on December 4, 1972. Phillips was also arrested on April 29, 1972, of violating the Massage Parlor Ordinance, tried May 11, 1972, and convicted.

From the entire record in this case it is clear that at the time of institution of these actions, and at the time of this Court's orders of dismissal, actions were pending in the State Courts. In Hampton, a civil action for declaratory judgment and an injunction to enjoin enforcement of the Ordinance, and in Newport News, criminal prosecutions.

Under the doctrine of *Younger v. Harris, supra; Samuels v. Mackell, supra; Boyle v. Landry, supra; Byrne v. Karalexis*, 401 U.S. 216 (1971); reiterated in *Lemon v. Kurtzman*, 411 U.S. 192 (1973), and set forth in *Lynch v. Snepp*, 472 F.2d 769 (4th Cir. 1973), this Court was required to dismiss the cases. Since remand, the civil action in Hampton has been dismissed, and the criminal prosecutions have terminated in the Newport News cases. While plaintiffs sought declaratory judgment, inasmuch as the Court has power to grant other relief under declaratory judgment, such as injunction, such would have been a violation under the *Younger* cases doctrine. This is made clear in *Samuels v. Mackell, supra*, at page 73. Too the plaintiff had ade-

quate remedies at law. The Court pointed out in *O'Shea v. Littleton,* ___ U.S. ___, January 14, 1974, that to obtain an injunction against State Court action, the applicant must show an inadequate remedy at law.

On March 20, 1974, the Supreme Court held in *Steffel v. Thompson* that under 42 U.S.C. 1983, the absence of pending state prosecution or failure to show irreparable injury or bad faith harrassment, did not preclude a plaintiff threatened with prosection under a disputed state criminal statute from obtaining declaratory relief. Hence, under 42 U.S.C. § 1983, a plaintiff who is threatened with prosecution under a questionable statute, may maintain a declaratory judgment action. However, plaintiffs do not ground jurisdiction under § 1983.

III

Defendants say that jurisdiction cannot be laid under 42 U.S.C. § 2000e, i.e., Equal Employment Opportunities, because sub-paragraph (b) of that Act says the term "employer" as used in the Act is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, ..." The evidence does not establish any of plaintiffs meet this test. *Hassell v. Harmon Foods, Inc.*, 454 F.2d 199 (6th Cir. 1972); *Coon v. Tingle*, 277 F. Supp. 304 (N.D. Ga. 1967).

Since it appears there is no jurisdiction under 42 U.S.C. § 2000e, defendants say the decision of the Supreme Court in *England v. Medical Examiners*, 375 U.S. 411 (1964), prohibit these parties from maintaining these actions. There, like here, the validity of a statute was challenged in the State Court, where plaintiffs were unsuccessful. They then

instituted action in the District Court. The Supreme Court said at pages 418-19:

> But we see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would not only countenance an unnecessary increase in the length and cost of the litigation; it would also be a potential source of friction between the state and federal judiciaries. We implicitly rejected such a rule in *Button,* when we stated that a party elects to forgo his right to return to the District Court by a decision "to seek a complete and final adjudication of his rights in the state courts." We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then – whether or not he seeks direct review of the state decision in this Court – he has elected to forgo his right to return to the District Court.

Too, defendants say plaintiffs are not entitled to relief in that they do not come into Court with clean hands. That is, each of them are guilty of unlawful conduct in their attempts to operate a massage parlor.

In *Lemon v. Kurtzman,* 411 U.S. 192, 201 (1973), the Court said:

> In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots.

Declaratory judgment is "essentially an equitable cause of action," *Samuels v. Mackell, supra* [401 U.S. 70], and as the Court pointed out in *Samuels*, the legislative history of the Declaratory Judgment Act "showed that Congress had explicitly contemplated that the courts would decide to grant or withhold declaratory relief on the basis of traditional equitable principles." [401 U.S. 70]. It further pointed out that in *Great Lakes Co. v. Huffman*, 319 U.S. 293, 300 (1943), it had held "that in an action for a declaratory judgment, 'the district court was as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds.'"

Applying these principles it seems that one who attempts to operate a bawdy house under the guise of massage parlor, is not in court with clean hands. There is no denial in the record that each of the undercover agents who visited plaintiffs' parlors, were solicited for unlawful acts. Nor is it denied that all of the evidence in this case concerning the activities within the massage parlors establishes them to be unlawful, irrespective of the Ordinance. This is not simply a case of whether a female may administer a massage to a male. All of the evidence establishes that as to plaintiffs, the action went beyond this limit.

The purpose of the clean hands doctrine is to secure justice, not to permit conduct which is unlawful or contrary to public policy. Equity will not and should not afford relief to one who has violated this maxim, nor should equity permit one to justify his unlawful conduct by granting him relief. It assumes even wider range where the public is involved. *Precision Company v. Automotive Company*, 324 U.S. 806, 814 (1945); *Bolling v. Bowden*, 118 F.2d 59, 62 (4th Cir. 1941); *Monsanto Co. v. Rohm & Haas Co.*, 456 F.2d 592, 598 (3d Cir. 1972); *Harrell v. Allen*,

183 Va. 722, 33 S.E.2d 222; *Helsley v. Fultz*, 76 Va. 671. In *Precision Company v. Automotive Company, supra*, at page 814, it was said:

> The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abettor of iniquity." *Bein v. Heath*, 6 How. 228, 247. Thus while "equity does not demand that its suitors shall have led blameless lives," *Loughran v. Loughran*, 292 U.S. 216, 229, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245; *Johnson v. Yellow Cab Co.*, 321 U.S. 383, 387; 2 Pomeroy, Equity Jurisprudence (5th Ed.) §§ 379-399.
>
> This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." *Keystone Driller Co. v. General Excavator Co., supra*, 245, 246. Accordingly one's misconduct need not

necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor.

Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance. See *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488, 492-494.

The last paragraph in the above quotation was cited with approval in *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 15 (1972). Like there, here the public interest is involved. The Court made it clear that where the public interest is involved the principle has greater application. In *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488, 492 (1942), the Court said:

> It is a principle of general application that courts, and especially courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest. *Virginian Ry. Co. v. Federation*, 300 U.S. 515, 552; *Central Kentucky Co. v. Railroad Commission*, 290 U.S. 264, 270-73; *Harrisonville v. Dickey Clay Co.*, 289 U.S. 334, 337-38; *Beasley v. Texas & Pacific Ry. Co.*, 191 U.S. 492, 497; *Securities & Exchange Comm'n v. U.S. Realty Co.*, 310 U.S. 434, 455; *United States v. Morgan*, 307 U.S. 183, 194.

This seems to be what the Court had in mind when it said one who was guilty of fraud may not challenge the constitutionality of a statute which required him to furnish the information he misrepresented. *United States v. Knapp*, 302 U.S. 214, 217 (1937); *Kay v. United States*, 303 U.S. 1, 6 (1938); *Acanfora v. Board of Education*, ___ F.2d ___(4th Cir. 2/7/74).

Considering the above principles, this case could be decided without reaching the constitutional issue. This is what the Supreme Court had in mind when it said it should first be determined whether the case could be decided without reaching the issue of constitutionality of the statute. *Johnson Administration v. Robinson*, ___ U.S. ___ (1974), 42 L.W. 4313; *United States v. 37 Photos*, 402 U.S. 363, 369 369 (1973).

Here, plaintiffs are not in court with clean hands; they are not seeking to carry on a lawful business but an exploitation of sex. The Ordinance does not prohibit plaintiffs from operating a massage parlor. It merely requires the parlor be operated in a lawful manner, and within the rules of decency.

IV

Much has been said and written in recent years of "equality," "sex discrimination," "equal rights for women" and so on. Do these terms mean that one sex shall be permit-

ted to do all things the other may be authorized to do? Do the changes in attitude mean all laws relating to sexual behavior are to be cast to the wind? Changing times bring about changing behavior, but does that mean each community must accept the conduct and behavior of each individual as proper, or may the community determine this by orderly process?

"Equality" is a broad term. Because the man appears at the beach or poolside without covering his body above the waist, is it lack of equality to prohibit a woman to do so? May a public restaurant refuse to admit patrons who are barefooted while admitting those in shorts? May the City prescribe standards for those operating businesses which affect the health and morals of its citizens? May it prohibit obscene conduct, even to selected patrons? If it may not prohibit the female sex from massaging the opposite sex, may it prohibit such conduct for juveniles?

An ordinance like unto the two here in question was before the Supreme Court of Virginia in *Kisley v. City of Falls Church*, 212 Va. 693, 187 S.E.2d 168 (1972). There, as here, the only challenge was to the prohibition of massage being administered by the opposite sex. There, as here, the challenge was to the denial of due process, and equal protection of the law. The Court held there was no denial of equal protection in that the ordinance applied alike to both men and women. It held the enactment and enforcement of the ordinance was a proper exercise of police power; it constituted a barrier against immoral acts likely to result from too intimate familiarty of the sexes, and that this was a reasonable regulation imposed in the fair exercise of police power; that the reasonable exercise of police power in regulating occupations to maintain the moral welfare does not arbitrarily deprive a person so engaged of his property;

that nothing in the ordinance denied the equal protection guaranteed by the Fourteenth Amendment.

An appeal to the Supreme Court of the United States was sought. On October 16, 1972, the appeal was dismissed "for want of a substantial federal question." 409 U.S. 907 (1972).

In the appeal of this case, the Court of Appeals held that "at least some of the federal claims sought to be litigated in the instant case were either not raised in the Virginia suit, or were not passed upon in any substantial way by the Virginia Supreme Court." 482 F.2d 580. Further, the Court said it was repugnant to Title VII of the Civil Rights Act of 1964. As pointed out above, neither plaintiff brings his case within the terms of that Act.

But if the Virginia Supreme Court has not passed on the constitutional issues here raised, then it would seem that in keeping with the doctrine of abstention, *Askew v. Hargrave*, 401 U.S. 476 (1971); *Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941); *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498 (1972); *Fralin and Waldron, Inc. v. City of Martinsville, etc.*, ___F.2d ___ (4th Cir. 2/25/74), we should await a decision of that Court on the issues.

However, the Court of Appeals directed this Court to conduct further proceedings in accordance with the views expressed in its opinion. In keeping with that direction, each side has been granted a full opportunity to present evidence and such argument as it desired.

Whether the Ordinance which regulates conduct of the sexes is a rational one is the question at issue. Is it withing the police powers of the City? In *California v. LaRue*,

409 U.S. 109 (1972), the Court had for determination whether certain sexual performances and the dispensation of liquor by the drink ought to occur at the same premises. The Court held that a prohibition of sale of whiskey by the drink where nude sex shows were presented was a rational one.

Likewise, in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973); *Kaplan v. California,* 413 U.S. 115 (1973); *Miller v. California,* 413 U.S. 15 (1973); *United States v. Orito,* 413 U.S. 139 (1973), the Court held that the rights and interests "other than those of the advocates are involved." 413 U.S. 58. These cases make clear that there is a "right of the Nation and of the States to maintain a decent society." 413 U.S. 59.

In the *Paris Adult Theatre* case, the Court said:

> From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. [413 U.S. 61].

* * * * *

The States, of course, may follow such a "laissez faire" policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the marketplace, but nothing in the Constitution *compels* the States to do so with regard to matters falling within state jurisdiction. See *United States v. Reidel,* 402 U.S., at 357; *Memoirs v. Massachusetts,* 383 U.S., at 462 (WHITE, J., dissenting). "We do not sit as a super-legislature to

> determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965). See *Ferguson v. Skrupa,* 372 U.S., at 731; *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423 (1952). [413 U.S. 64].

* * * * *

> Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue. [413 U.S. 67].

* * * * *

> The States have the power to make a normally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the State's "right . . . to maintain a decent society." *Jacobellis v. Ohio,* 378 U.S., at 199 (dissenting opinion). [413 U.S. 69].

The Supreme Court has held that within the Constitution the law may regulate the right to deal in obscenity, *Kaplan v. California, supra; United States v. Reidel,* 402

U.S. 351 (1951); that Congress may prevent the use of the mails for its distribution, *United States v. Reidel, supra; United States v. 37 Photos,* 402 U.S. 363 (1971); interstate transportation is subject to regulation prohibiting transportation of obscene materials, *United States v. Orito,* 413 U.S. 139 (1973), and that in determining what is obscene, state standards may be used. *Kaplan v. California, supra.* Further the Court held that commerical sales of obscene materials, even to consenting adults, is subject to state regulation. *United States v. Orito,* 413 U.S. 139 (1973); *United States v. 12 200-Ft. Reels of Film,* 413 U.S. 123 (1973). The determination of obscenity is to be made, not by national standards, but by community standards. *Miller v. California, supra; Paris Adult Theatre v. Slaton, supra.*

If states have the power to make a rational judgment that exhibition of obscenity, or commerce in such material has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize the States' right to maintain a decent society, as the Paris Adult Theatre sets forth, then why may it not control the action of those who would operate such obscene and immoral places of business. Massage parlors are public places and the issue arises as to whether juveniles can be restricted from them. They are operated solely to exploit sex. The attraction of the massage parlors is sex, not massage.

Here, the prohibition of a person massaging the opposite sex bears a rational relationship to a state objection that is sought to be advanced by the Ordinances.

A law need not be in every respect logically consistent with its aims in order to be constitutional. It is enough

that there is an evil at hand for correction, and it appears the particular legislative measure is a rational way to correct the evil. *Williamson v. Lee Optical,* 348 U.S. 483, 488 (1955). A city council is free to adopt any classification it deems appropriate to promote the general welfare so long as the classification bears a reasonable relation to a proper legislative purpose. *McGowen v. Maryland,* 366 U.S. 420, 425 (1961); *English v. Virginia Probation, etc.,* 481 F.2d 188 (4th Cir. 1973). Too, the existence of some inequality in the manner in which the State's rationale is achieved is not alone sufficient for striking down the Ordinance. *San Antonio School District v. Rodrigues,* 411 U.S. 1 (1973). It may not be condemned simply because it imperfectly effectuates the State's goals. *Dandridge v. Williams,* 397 U.S. 485.

In *Village of Belle Terre v. Boraas,* _____ U.S. _____ (1974), 42 L.W. 4475, the Court dealing with a zoning ordinance and referring to its opinion in *Euclid v. Ambler Realty Co.,* 272 U.S. 365, said:

> The ordinance was sanctioned because the validity of the legislative classification was "fairly debatable" and therefore could not be said to be wholly arbitrary.

The Court further pointed out in the *Village of Belle Terre* case that the "concept of the public welfare is broad and inclusive," and that the values it represents are spiritual as well as physical, and it is within the power of the legislature to determine that the community should be well-balanced as well as carefully patrolled. Too, while the legislation may not include all that should be included, "That exercise of discretion, however, is a legislative not a judicial function." Footnote 5 quotes from Mr. Justice

Holmes' dissent in *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 44:

> "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark."

Asserting that the Ordinance violates the Equal Protection Clause of the Fourteenth Amendment, plaintiffs cite *Reed v. Reed*, 404 U.S. 71 (1971) in support thereof. A reading of that decision will lend little comfort to the plaintiffs. There at issue was a statute granting rights of qualification upon an estate, first to males, as opposed to females. This is not the issue in the case at bar. The Ordinance applies equally to them. In the *Reed* case, in speaking of the Equal Protection Clause, the Court said at page 75:

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier v. Connolly*, 113

> U.S. 27 (1885); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Railway Express Agency v. New York*, 336 U.S. 106 (194(); *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969). The Equal Protection
>
> Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not aribitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920

In *Miller v. California*, supra, the Court made it clear that sex could not be exploited or "exhibited or sold without limitation in such public places." 413 U.S. 26. In footnote 8 on page 26, the Court pointed out:

> Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior.

The footnote continues:

> In *United States v. O'Brien*, 391 U.S. 367, 377 (1968), a case not dealing with obscenity, the Court held a State regulation of con-

duct which itself embodied both speech and nonspeech elements to be "sufficiently justified if . . . it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." See California v. LaRue, 409 U.S. 109, 117-118 (1972).

In the *LaRue* case, the Court said at page 117:

> But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of "cokduct" or "action," , , , ,

Since a state of facts exists to justify the Ordinance, and to regulate illegal conduct, it should not be declared unconstitutional.

In view of the above, even if plaintiffs, have a standing to prosecute these actions, the Ordinance is not unconstitutional.

The actions are accordingly DISMISSED.

United States District Judge

Norfolk, Virginia
April 10, 1974

APPENDIX B
FOR THE FOURTH CIRCUIT

No. 74-1656

Patricia Hogge, Earle Phillips, T/A Paradise Massage Parlor, BO-JAC, LTD., T/A Miss Masseuse,

Appellants,

versus

C. E. Johnson, City Manager, and Patrick B. Minetti, Chief of Police, of the City of Hampton, Virginia, each in their official capacity,

Appelles.

No. 74-1657

Scarlett Anne Hilliard, Earle Phillips,. T/A French Massage Parlor,

Appellants,

versus

William E. Lawson, City Manager, and Howard B. Blackmon, Chief of Police, each in their official capacity,

Appelles.

Appeals from the United States District Court for the Eastern District of Virginia, at Newport News. Richard B. Kellam, District Judge:

Argued January 8, 1975 Decided August 19, 1975

Before CLARK, United States Supreme Court Justice, Retired*, CRAVEN and BUTZNER, Circuit Judges.

Rebecca J. April Fitch (Kenneth C. Hogge; Carmel, Gray and Hogge on brief) for Appellants in Nos. 74-1656 and 74-1657; Thomas E. Glascock for Appellees in No. 74-1656; Robert M. Roylance, Assistant City Attorney, for Appellees in No. 74-1657.

* Sitting by Designation.

CRAVEN, Circuit Judge:

Plaintiffs below sought injunctive and declaratory relief against local ordinances designed to regulate massage parlors in Hampton and Newport News, Virginia. With certain exceptions, the ordinances prohibit, under criminal sanction, the massage of any person by another of the opposite sex.[1]

[1] The pertinent parts of the Hampton and Newport News ordinances are as follows:

> Massage by person of opposite sex prohibited; exceptions.
>
> It shall be unlawful for any person to administer, for hire or reward, to any person of the opposite sex any massage, any alcohol rub or similar treatment, any fomentation, any bath, or any electric or magnetic treatment, nor shall any person cause or permit in or about his place of business, or in connection with hi business, any agent, employee or servant or any other person under his control or supervision to administer any such treatment to any person of the opposite sex.
>
> This section shall not apply to any treatment administered in good faith by a physician, surgeon, chiropractor, osteopath or physical therapist duly licensed by the Commonwealth fo Virginia, or to a licensed nurse acting under the direct prescription and direction of any such physician, surgeon, chiropractor or osteopath, nor shall this section apply to barbers of beauticians who give massage to the scalp, the face, the neck or the shoulders only.

Hampton, Va., Code § 22.1-ll (1972).

> (a) It shall be unlawful for any establishment, owner, or operator regardless of whether it is a public or private facility, to operate as a massage parlor, bath parlor, health club or any similar type of business, where any physical contact or massage with the recipient of the

(continued)

That prohibition was attacked as requiring sex discrimination in the employer of massage parlor attendants, in conflict with Title VII of the Civil Ri ghts Act of 1964, 42 U.S.C. § 2000e et seq., and therefore inoperative under the Supremacy Clause, U.S. Const. Art. VI.

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[1](continued)

service provided by said establishment is provided by a person of the opposite sex.

(b) It shall be unlawful for any employee, individual, owner or operator of such establishment or any other type establishment to give or administer a massage to a member of the opposite sex.

Newport News, Va., Code Cap. 21C (1972).

The preamble to the Hampton ordinance reads in part as follows:

WHEREAS, the Council of the City of Hampton, Virginia, is authorized. . . to exercise all powers which in the opinion of the Council are necessary or desirable to promote the general welfare of the City and the safety, health, peace, good order, comfort, convenience, and morals of its inhabitants; and,

WHEREAS, upon report of the Division of Police, administrative officers, and inhabitants of the City, such places called "massage parlors" and similar establishments as hereinafter defined are being used, or may be used because of their nature, as houses of prostitution, or places where disorderly, lewd, lascivious and unlawful conduct or exhibitions occur; and,

WHEREAS, it is the opinion of the Council of the City of Hampton, Virginia, that it is proper and fitting that the massage parlors and similar establishments, as hereinafter defined, should be regulated in order to protect the public safety, health, good order and morals of the City, and to aid in the enforcement of its, and the State's, laws.

In *Joseph v. Blair*, 482 F.2d 575 (4th Cir. 1973), *rehearing denied*, 488 F.2d 403, *cert. denied*, 416 U.S. 955 (1974), we reversed an earlier order of the district court that dismissed these complaints on the basis of *Younger v. Harris*, 401 U.S. 37 (1971). We noted in passing that a similar ordinance of the City of Falls Church, Virginia, had been adjudged constitutional by the Virginia Supreme Court in *Kisley v. City of Falls Church*, 212 Va. 693, 187 S.E.2d 168 (1972), and that an appeal to the Supreme Court of the United States had been dismissed for want of a substantial federal question, 409 U.S. 907 (1972). But we then felt that the Court's dismissal in *Kisley* should not be treated as an adjudication on the merits because the representations of the parties made in their briefs and arguments indicated that at least some of the federal claims sought to be litigated in the instant case were either not raised in the Virginia suit or were not passed upon in any substantial way by the Virginia Supreme Court, pointing specifically to plaintiffs' claim that the ordinances were repugnant to Title VII of the Civil Rights Act of 1964.

Quite recently, the United States Supreme Court has spoken to the question among the circuits with respect to the meaning to be accorded dismissal for want of a substantial federal question. Such a dismissal is a decision on the merits binding upon the inferior federal courts. It is stare decisis on issues properly presented to the Supreme Court and declared by that Court to be without substance. *Hicks v. Miranda*, 17 Crim. L. Rep. 3113 (June 24, 1975). Thus we are led to compare again the issues presented on the evidence in these cases with the issues decided by the Supreme Court in *Kisley*.

In *Kisley*, *supra*, the Virginia Supreme Court sustained the constitutionality of Ordinance No. 512 of the City of

Falls Church, which ordinance provided that:

> It shall be unlawful for any establishment, regardless of whether it is a public or private facility, to operate as a massage salon, bath parlor, or any similar type business, where any physical contact with the recipient of such services is provided by a person of the opposite sex.

The Virginia Supreme Court considered and rejected arguments that Ordinance No. 512 deprived owners and operators and employees of massage parlors property rights without due process of law and denied them equal protection of the laws, quoting favorably from *Ex parte Maki,* 133 P.2d 64 (1943):

> "The ordinance applies alike to both men and women . . . . The barrier erected by the ordinance against immoral acts likely to result from too imtimate familiarity of the sexes is no more than a reasonable regulation imposed by the city council in the fair exercise of police powers."
>
> ". . .The reasonable exercise of the police power in regulating any occupation in order to maintain the moral welfare does not arbitrarily deprive a person so engaged of his property . . . . Enactments that curb the vicious or restrain the wicked necessarily restrict the emoluments of his enterprise. However, such results are not to be considered in determining the validity of a law.

* * * * *

> "There is nothing in the ordinance that denies the equal protection guaranteed by the Fourteenth Amendment . . . ."

Kisley v. City of Falls Church, supra, 187 S.E.2d at 171.

The Falls Church ordinance examined in *Kisley, supra,* is substantially identical with the ordinances of Hampton and Newport News set out in footnote 1, *supra.* We think the issue presented to the Supreme Court in the appeal of *Kisley* and declared by it to be without substance included the question sought to be raised here: whether the ordinances violate the fourteenth amendment's equal protection clause. Thus, summary dismissal of the appeal in *Kisley* is a perfectly clear precedent that is binding upon us.[2]

The only question remaining is plaintiffs' contention that the ordinances are in conflict with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The district court noted that the Act defines the term employer to mean "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, ..." He found as a fact that "the evidence does not establish any of plaintiffs meet this test." The evidence is both conflicting and confusing, but there is substantial support for such a finding, and it is not clearly erroneous.

AFFIRMED.

[2] We need not decide whether other cases in the Supreme Court dismissed for want of a substantial federal question presented a similar issue. *See* Smith v. Keaton, 419 U.S. 1043 (1974); Rubenstein v. Township of Cherry Hill, 417 U.S. 963 (1974); Patterson v. City of Dallas, 372 U.S. 251 (1963).

MR. JUSTICE CLARK, concurring:

I concur but wish to comment on the holding that we are bound here by the 1972 order in the *Kisley* case which was dismissed by the Supreme Court for want of a substantial federal question. The Supreme Court's statements in *Hicks v. Miranda,* No. 74-156 (U.S., filed June 24, 1975), to the effect that such dismissals are decisions "on the merits", seem to me to fly in the face of the long-established practice of the Court at least during the eighteen Terms in which I sat. During that time, appeals from state court decisions received treatment similar to that accorded petitions for certiorari and were given about the same precedential weight. An unquestioning application of the *Hicks* rule can lead to nothing but mischief and place an unnecessary restraining hand on the progress of federal constitutional adjudication.

Here, for example, the other members of the panel thought, as did I, that there *was* a substantial federal question presented by this case. The question deserves elaboration. That is foreclosed by *Hicks'* holding that we must accept the *Kisley* dismissal as binding. Yet I cannot believe that the Court in 1972 gave such serious consideration to the merits of that case as to justify the precedential value now assigned to it.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1656

Patricia Hogge, Earle Phillips, T/A Paradise Massage Parlor, BO-JAC, LTD., T/A Miss Masseuse,

Appellants,

versus

C.E. Johnson, City Manager, and Patrick B. Minetti, Chief of Police, of the City of Hampton, Virginia, each in their official capacity,

Appellees.

No. 74-1657

Scarlett Anne Hilliard, Earle Phillips, T/A French Massage Parlor,

Appellants,

versus

William E. Lawson, City Manager, and Howard B. Blackmon, Chief of Police, each in their official capacity,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News, Richard B. Kellam, District Judge

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Virginia and was argued by counsel.

On consideration wherefore, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause, be, and the same is hereby, affirmed by our Court.

For the Court-by Direction

CLERK

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

74-1656/7

Patricia Hogge, Earl Phillips, T/A
Paradise Massage Parlor, BO-JAC, LTD,
T/A Miss Masseuse,

Appelles.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA; AT NEWPORT NEWS.

Upon consideration of the petition for rehearing and twe suggestion for rehearing en banc, no Judge having requested a poll on the suggestion for rehearing en banc,

IT IS ORDERED that the petition for rehearing is denied.

For the Court-by Direction

CLERK